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U.S. Citizenship  
and Immigration  
Services

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BC



FILE: EAC 05 046 52716 Office: VERMONT SERVICE CENTER Date: OCT 24 2006

IN RE: Petitioner:  
Beneficiary



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel states that the petitioner has the ability to pay the proffered wage. Counsel submits further documentation on the petitioner's financial resources.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage as stated on the Form ETA 750 is a hourly wage of \$18.89, or an annual salary working 35 hours a week of \$34,379.80.<sup>1</sup> On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since August 1999.

On the petition, the petitioner claimed to have been established on July 27, 1998, to have a gross annual income of \$279,119 and a net annual income of \$189,251. The petitioner did not indicate the number of its

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<sup>1</sup> The AAO calculates this figure by multiplying the hourly wage by 35 hours a week, and then by 52, for weeks in a year.

employees on the petition. In support of the petition, the petitioner submitted a letter of work verification from Pasta Cucina restaurant, in New City, New York. ██████████ President of Pasta Cucina, stated that the beneficiary had worked for the business from April 1996 to June 1998 as a fulltime cook of Italian food. The petitioner also submitted a cover letter dated November 29, 2004 that stated the beneficiary had worked previously for the petitioner from August 1999 to March 2001. The petitioner stated that when he discovered that the beneficiary did not have an employment authorization card to legally work in the United States, the petitioner decided to sponsor the beneficiary for the I-140 petition and labor certification process.

The petitioner also submitted IRS Form 1120S, the petitioner's corporate income tax return for 2001. This document indicates the petitioner had ordinary income of \$7,959 in tax year 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 22, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its 2002 and 2003 U. S. federal income tax returns with all schedules and attachments, or annual reports for the same years accompanied by audited or reviewed financial statements. In addition, the director requested that the petitioner submit copies of the beneficiary's W-2 forms to establish how much the petitioner had paid the beneficiary in tax years 2001 to 2003.

In response, counsel submitted IRS Forms 1120S, the petitioner's corporate tax returns for the year 2002 and 2003.<sup>2</sup> These documents indicate the petitioner had ordinary income of \$969 in tax year 2002 and ordinary income of -\$29,429 in tax year 2003.

On April 25, 2005, the director denied the petition. In his denial of the petition, the director stated that the petitioner had offered the beneficiary a proffered wage of \$34,380. The director then noted that in tax year 2001, the petitioner had net income of \$7,959, and that the petitioner's liabilities exceeded its assets by \$17,192.<sup>3</sup> With regard to tax years 2002 and 2003, the director noted the petitioner had a net profit of \$969 and that its liabilities exceeded its assets by \$8,692. In 2001, the director stated the petitioner reported a net loss of \$29,429, and its liabilities exceeded its assets by \$20,496. The director then determined that the petitioner had not established its ability to pay the proffered wage as of the 2001 priority date and to the present.

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<sup>2</sup> The IRS Forms 1120 submitted to the record for tax years 2001 and 2002 indicate the petitioner is ██████████ at the same address as ██████████, and that both businesses share the same employer identification number (EIN), namely ██████████. The IRS Form 1120 submitted to the record for tax year 2003 indicate the petitioner is ██████████ at the same address as ██████████ and also sharing the same EIN. It appears that ██████████ and ██████████ are one and the same business.

<sup>3</sup> Although the director used the terms liabilities and assets, the director was actually addressing the petitioner's net assets and net liabilities. The AAO will address more fully further in these proceedings how the petitioner's net income and net current assets are calculated with regard to the I-140 employment-based petition.

On appeal, counsel states that the petitioner is more than able and willing to pay the beneficiary's salary of \$34,380.<sup>4</sup> Counsel submits a letter from ██████████ Sales Associate, Provident Bank, Montebello, New York. The letter, dated May 13, 2005, states that the petitioner has had a business relationship with Provident Bank since August 18, 1998, and that the petitioner has maintained a monthly average balance of \$7,374.82. ██████████ states that the petitioner's current balance is \$14,007.96 with a line of credit of \$70,000. Mr. ██████████ stated that the bank considered the petitioner a good credit risk.

The letter submitted to the record on appeal from a sales associate from Provident is not persuasive. There is no further evidentiary documentation to further substantiate the sales associate's assertions. The assertions of the bank's sales associate, as well as the counsel's assertions on appeal with regard to the petitioner's ability to pay the proffered wage do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). But more importantly, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Furthermore, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or a line of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to

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<sup>4</sup> The AAO identifies the proffered wage as \$34,379.80.

determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the petitioner indicated in its cover letter for the petition that it employed the beneficiary from January to March 2001, it provided no further evidentiary documentation of such employment. Once again, the assertions of counsel, and the petitioner do not constitute evidence. *See Obaigbena*, as well as *Ramirez-Sanchez*. Therefore, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001, 2002, and 2003 show the following amounts of ordinary income: \$7,959, \$969, and -\$29,429 in tax year 2003. These figures fail to establish the ability of the petitioner to pay the proffered wage of \$34,379.80.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner submitted the following information for tax years 2001, 2002 and 2003:

	2001	2002	2003
Ordinary Income	\$ 7,959	\$ 969	\$ -29,429
Current Assets	\$ 13,656	\$ 9,920	\$ 5,373
Current Liabilities	\$ 30,848	\$ 18,612	\$ 25,869
Net current assets	\$ -17,192	\$ -8,692	\$ -20,496

These figures fail to establish the ability of the petitioner to pay the proffered wage. The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. In 2001, the petitioner shows a net income of \$7,959, and net current assets of -\$17,192, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2002, the petitioner shows a net income of \$969, and net current assets of -\$8,692, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2003, the petitioner shows a net income of -\$29,429 and net current assets of -\$20,496, and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has also not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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